Choo Chang Teik & Anor v Public Prosecutor

SUPREME COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 05-24-89 AND 05-25-89
ABDUL HAMID OMAR LP, MOHAMED YUSOFF SCJ AND EUSOFF CHIN J
25 SEPTEMBER 1991

Criminal Procedure — Presumptions — Charge of trafficking in heroin — Presumptions against accused persons — Whether accused persons have rebutted the presumptions — Duty of prosecution to prove its case — Dangerous Drugs Act 1952, ss 37(d), (da), (g) & 39B(1)(a)

Evidence — Failure to call witness in defence — Adverse inference drawn — Burden on defence to prove rebuttal evidence adduced — Evidence Act 1950, s 114(g)

Criminal Procedure — Joint trial — Onus of proving a criminal charge in a joint trial lies with the prosecution

In this case, the appellants had ben charged with trafficking in heroin. The heroin was found in a house in which the appellants were also found together with another person, since deceased. On the evidence adduced, the learned trial judge called on the appellants to enter their defence as he held that the presumptions arose that they had possession and control of the heroin and that they had the presumed knowledge of the existence of the drugs in the house. The appellants in their defence said that the drugs belonged to the other person who had since died. Evidence was given that the travelling bag in which the drugs were found belonged to that other person.

Held, allowing the appeal:

(1) On a proper assessment of the evidence for the defence, it is probable that both the appellants had no knowledge of the offending drugs in the travelling bag recovered from the toilet of the master bedroom. The evidence showed that the other person was alone in the room when he was arrested.

(2) Although the learned judge had rightly drawn an inference against the first appellant because he had failed to call witnesses to testify that he had been attacked by thugs two years before as reason for him to run away from the scene, yet in offences involving capital punishment such as trafficking in drugs, evidence by inference alone is not sufficient to support a conviction of the appellant without some proof of the element of control.

(3) Although it is unfortunate in this case that a guilty party cannot be brought to justice, it is most important that there should not be a miscarriage of justice and the law should be maintained that the prosecution should prove its case.

[Bahasa Malaysia summary

Di dalam kes ini, perayu-perayu telah dituduh mengedar heroin. Heroin itu dijumpai di dalam rumah di mana perayu-perayu dijumpai bersama seorang lagi yang selepas itu telah meninggal dunia. Di atas keterangan yang dikemukakan, hakim yang arif telah memanggil perayu-perayu membuat pembelaan mereka oleh kerana beliau berpendapat anggapan-anggapan telah timbul bahawa heroin itu berada dalam milikan dan kawalan mereka dan juga mereka boleh dianggap mengetahui adanya dadah di dalam rumah itu. Perayu-perayu dalam pembelaan mereka telah mendakwa bahawa dadah itu kepunyaan orang lain yang telah meninggal dunia itu. Keterangan telah diberi bahawa beg perjalanan di dalam mana dadah itu didapati adalah milik orang lain itu.

Diputuskan, membenarkan rayuan itu:

(1) Dengan pertimbangan sewajarnya keterangan bagi pihak pembela, adalah mungkin kedua-dua perayu itu tidak tahu tentang adanya dadah di dalam beg perjalanan yang didapati dalam tandas bagi bilik utama rumah itu. Keterangan yang diberi menunjukkan bahawa orang yang lain itu berada seorang diri di dalam bilik itu apabila dia ditangkap.

(2) Sungguh pun hakim yang arif telah dengan sebetulnya membuat inferens terhadap perayu pertama oleh kerana ia gagal memanggil saksi mengatakan bahawa ia telah diserang oleh penyamun dua tahun dahulu sebagai sebab kenapa dia berlari dari tempat kejadian itu, akan tetapi bagi kesalahan-kesalahan yang boleh membawa hukuman mati seperti mengedar dadah, keterangan dari inferens sahaja tidaklah mencukupi untuk menyokong sabitan perayu itu tanpa apa-apa bukti menunjukkan unsur kawalan.

(3) Sungguh pun malangnya di dalam kes ini orang yang bersalah tidak dapat dihukum, yang paling penting sekall adalah tidak berlaku salah laksana keadilan dan undang-undang yang memerlukan pihak pendakwa membuktikan dakwaannya hendaklah dipertahankan.]

Cases referred to

1 *Illian & Anor* v *PP* [1988] 1 MLJ 421 (distd)
2 *Baharom* v *PP* [1960] MLJ 249 (folld)
3 *R* v *Bland* [1988] Crim LR 41 (folld)
4 *R* v *Abbott* [1955] 2 All ER 899 (folld)

Legislation referred to

Dangerous Drugs Act 1952 ss 37(d), (da), (g), 39B(1)(a)
Evidence Act 1950 s 114(g)

Appeal from: Criminal Trial No CR 58-3-87 (High Court, Kuala Lumpur)

Cristopher Fernando (*S Selvarajah* with him) for the appellants.

Kang Hwee Gee (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

Mohamed Yusoff SCJ (delivering the judgment of the court): We allowed this appeal, set aside the conviction and sentence against both appellants and indicated that we would give our reasons later. We do so now.

Both the appellants, Choo Chang Teik (first appellant) and Teoh Hee Siang (second appellant), were charged for trafficking in 6,039.99g of heroin contrary to s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act').

The facts of the case are that on 6 November 1985, a police party headed by Insp Amarjit Singh kept surveillance on a house No 12 Jalan Senohong Satu, Taman Cantik, Cheras, Kuala Lumpur. This was a double-storey house. At about 6pm they saw two motor cars leaving the shopping area nearby. Both cars stopped at the house. One motor car, a grey Datsun Stanza, was driven by the first appellant and the other by one Tan

Soon Hock with the second appellant sitting beside him. As Tan Soon Hock and the second appellant entered the house, they saw the first appellant taking out something heavy from the boot of his motor car and carrying it into the house.

At 6.15 pm, the police party raided the house. They found the front door locked. Using a crowbar, they broke open the door. On entering the house they saw the first appellant walking towards the kitchen. On seeing them, the first appellant ran away. He was chased and was arrested some distance away from the house.

Another group of police officers rushed upstairs and they saw both the second appellant and Tan Soon Hock in the master bedroom. As they shouted 'Police!', both of them ran towards the balcony and the second appellant managed to jump out of the window. He was finally also arrested some distance away from the house. Tan Soon Hock was, however, arrested in the master bedroom. Concealed in the bathroom attached to the master bedroom, Insp Amarjit Singh recovered a brown travelling bag which was later found to contain heroin.

Tan Soon Hock was consequently charged together with the appellants for the offence but as his fate determined it, he has since died in police custody just before the trial.

The prosecution also adduced evidence that the first appellant was present when the second appellant rented the house from its agents and, at different times, Tan Soon Hock also participated in the negotiation on the rent payable for the house.

On these facts the learned judge called on both the appellants to enter their defence. Obviously the presumptions under s 37(da) and (g) of the Act had arisen in that both the appellants had possession and control of the heroin referred to in the charge and that they had the presumed knowledge of the existence of the drug in the house. The question arose whether both the appellants have rebutted those presumptions.

We agree with learned counsel for the appellants who pointed out that the learned judge, however, had mistakenly relied on the presumption in s 37(d) of the Act. But we do not agree that such a mistake detracted from established facts which prima facie constitute an offence under the Act, nor that such an error had caused a miscarriage or failure of justice.

Upon hearing the defence of both the appellants, the learned judge totally rejected them. We do not agree and hence allowed the appeal.

The defence is that the second appellant said that he and Tan Soon Hock had rented the house on 4 November 1985, meant for his office. He took the keys from its owner. He said that in the afternoon of 5 November 1985, Tan Soon Hock borrowed the keys from him saying that he wanted to put something in the house. He also said that on 6 November 1985, he met his old friend, the first appellant, while he was having lunch with Tan Soon Hock. His friend wanted to rent a room in the house to which he and Tan Soon Hock agreed. In the evening of 6 November they moved into the house. They ordered some furniture for the house as evidenced by a receipt produced bearing the same date, 6 November 1985, while the first appellant bought a pail, rubber hose and mops at the adjacent mini-market, for cleaning the house.

They were in the house for a short while when they heard a noise at the main door. The first appellant said that he was walking to the kitchen when suddenly he saw some people with crowbar and pistol in hand shouting at him. He ran away fearing that he might be assaulted. He said he did so because of his previous experience of being beaten by thugs at his friend's house at Johore Baru which left him disabled for about two years. They had injured his waist. He produced a certificate of his membership of a handicapped persons' association to prove this contention.

The second appellant, on the other hand, said that he was upstairs walking towards the room when he saw some people running up the stairs with iron rod and pistol in hand. He said that Tan Soon Hock shouted at him to run. When he did so he heard pistol shots behind him. Consequently, he jumped on top of a motor car below and kept on running, he said, until he was arrested and brought back to the house. He denied any knowledge of the travelling bag recovered in the bathroom.

Both appellants also adduced evidence by an independent witness, Tan Soon Hoe, which was not challenged by the prosecution, who said that on the instruction of his late brother, Tan Soon Hock, he had brought the travelling bag from the family house at Gurun, Kedah and had left it in the empty house at Kuala Lumpur.

We feel that on the evidence as a whole, the defence raised by both the appellants is reasonable and probable and sufficient to rebut the presumption under the Act. The prosecution's evidence, on the other hand, is not without flaws. ASP Manan's evidence was vague when he said that from his ambushed position across the road he had seen the first appellant carrying something heavy from the boot of his motor car but could not describe the object although he maintained that his view was not obstructed. In this aspect of the case, there is no other evidence to show that the offending drug was taken to the house by either of the appellants.

The prosecution's evidence against the second appellant as to whether he had knowledge of the travelling

bag in the toilet of the master bedroom was equally doubtful. Insp Amarjit Singh's evidence against him says that the second appellant was standing at the entrance of the bedroom when the inspector rushed up the stairs upon his entrance into the house.

On seeing him, he said, the second appellant ran and jumped over the balcony when he fired five shots from his automatic rifle at the second appellant. He also said that Detective Cpl Omar then rushed into the bedroom and arrested Tan Soon Hock. However, Detective Cpl Omar was not called to give evidence to say where the second appellant was in relation to Tan Soon Hock at the time of his arrest.

On a proper assessment of this evidence, it is probable that both the appellants had no knowledge of the offending drugs in the travelling bag recovered from the toilet of the master bedroom. The evidence shows that Tan Soon Hock was alone in the room when he was arrested.

The time lapse was only a few minutes after they were in the house when the police party forced their way into it. The first appellant was seen still walking towards the kitchen and the second appellant was merely standing at the entrance of the master bedroom when they were suddenly confronted by a police party not in uniform and armed with rifles and guns rushing at them; they had every reason to run away for their own safety.

We are not unmindful of the adverse inference drawn by the learned judge under s 114(g) of the Evidence Act 1950 against the first appellant because he had failed to call his witnesses to testify that he had been attacked by thugs two years before as reason for him to run away from the scene, and hence the learned judge ruled that the appellant by inference of fact had the necessary knowledge of the existence of the drug in the house.

Counsel on behalf of the first appellant objected to the inference drawn under s 114(g) of the Evidence Act 1950. He cited *Illian & Anor* v *PP*[1] as his proposition that s 114(g) of the Evidence Act 1950 cannot be invoked against an accused person nor can the failure of the accused to call any witness be made the subject of comment at a criminal trial. We do not agree and find that the facts in *Illian*'s case[1] are distinguishable.

In that case, Illian was jointly charged with one Yu Kiat Ho in trafficking dangerous drugs on 19 November 1978 in Kangar, Perlis. In evidence both accused were seen handing the drug to a third person. In the confusion that followed, both Illian and the third person escaped from the scene. He was, however, arrested later and charged jointly with Yu. Illian's defence was an alibi showing that between 16 November 1978 and 20 November 1978, he was in Thailand. He produced a border pass to prove his alibi. The prosecution's application to adduce evidence in rebuttal that the border pass was not genuine was refused by the learned judge. At the end of the trial the learned judge drew an adverse inference against Illian on his failure to call any witness to support his defence.

It is noteworthy that the present case differs from *Illian*'s.[1] Here, the prosecution had taken particular issue on the contention by the first appellant that he had been beaten two years before. Evidence in rebuttal was adduced by the prosecution showing that the first appellant had told some police officers during that period that he had a fall in his cell which caused his injury.

The distinction in the present case is that upon rebuttal evidence having been adduced, the law has cast the burden on the first appellant to prove his own contention by the evidence of his friend at whose house he was seen beaten. When he failed to offer such proof the natural conclusion is that the proof, if produced, instead of rebutting would sustain the charge.

On this view we are in agreement with the learned judge that an adverse inference can be drawn against the first appellant in the present situation when a complete case has been made out against the first appellant and the case disclosed that there is evidence which could be produced by the appellant to negate the charge against him — see commentary on s 114 *Law of Evidence in India* by Woodroffe and Ameer Ali (13th Ed) at p 2656.

Our view is fortified by the decision in *Baharom* v *PP*.[2] In that case, the accused was convicted and sentenced to death for murder. He raised insanity as a defence. At one stage or another the defence knew that the Principal Officer, Pudu Jail, the Medical Officer i/c of Prison and the Medical Superintendent, Tanjong Rambutan were in a position to give evidence if called upon as to the accused's state of mind. The defence did not produce any of those witnesses. The learned trial judge expressed his opinion, when directing the jury, that he could find no evidence of insanity.

On appeal on the point that the trial judge had misdirected the jury, Thomson CJ said at p 250:

> ... it was for the defence to call that evidence and if they did not do so the jury might safely draw the unfavourable inference provided for by s 114(g) of the Evidence Ordinance, that is to say that if called it would be unfavourable to the accused.
>
> ... in such a case there is an onus on the defence, that is to prove that the accused was insane.

Be that as it may, we feel that in offences involving capital punishment such as trafficking in drugs, evidence by inference alone is not sufficient to support a conviction of the appellant without some proof of the element of control.

In *R* v *Bland*,[3] the appellant was charged with possession of a controlled drug with intent to supply. The prosecution case against her relied solely on the fact that she was living with Ratcliff at a time when he had undoubtedly dealt in drugs. At the close of the prosecution case, counsel for the appellant submitted that there was no evidence to go before the jury. However, counsel for the Crown submitted that it was open to the jury to find that the appellant knew what Ratcliff was doing and that she had acted, not as principal, but as one who had lent passive assistance. The recorder rejected the defence submission; the appellant was convicted the appealed against conviction. In allowing the appeal, the justices of the Court of Appeal Criminal Division held that:

> The fact that the appellant and Ratcliff lived together in the same room was not sufficient evidence from which the jury could draw such an inference. There was sufficient evidence from which the jury could have inferred knowledge on the appellant's part that Ratcliff was drug-dealing, but no more. Assistance, though passive, required more than mere knowledge; for example, it required evidence of encouragement at least, or of some element of control, which was entirely lacking in the case. The case should have been withdrawn from the jury.

The onus of proving a criminal charge against both appellants in a joint trial always lies with the prosecution. In *R* v *Abbott*,[4] at p 899, it was held that:

> If two people are jointly indicted for the commission of a crime and the evidence does not point to one rather than the other, and there is no evidence that they were acting in concert, the jury ought to return a verdict of not guilty against both because the prosecution have not proved the case. If in those circumstances, it were left to the defendants to get out of it if they could, that would put the onus on the defendants to prove themselves not guilty.

In the present case we are of the view that although it is unfortunate that a guilty party cannot be brought to justice, it is more important that there should not be a miscarriage of justice and the law should be maintained that the prosecution should prove its case.

Appeal allowed.

Solicitors: *Fernandez & Co.*

Reported by *Prof Ahmad Ibrahim*

Public Prosecutor v Lam San

SUPREME COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 05-59-91
HASHIM YEOP A SANI CJ (MALAYA), MOHAMED YUSOFF AND GUNN CHIT TUAN SCJJ
23 SEPTEMBER 1991

Evidence — Evidence of chemist — Charge of trafficking in dangerous drugs — Evidence of chemist that package found contained heroin — How trial court should approach evidence of chemist

Criminal Law — Dangerous drugs — Trafficking in — Evidence of chemist — How evidence should be approached

In this case, the respondent had been charged for trafficking in drugs, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952. Evidence was given that when the police raided a house, a package was found near the respondent which package was subsequently certified by the chemist to contain 34.81g of heroin. The learned trial judge found the evidence of the chemist 'sketchy' and 'unsatisfactory' and doubted the accuracy of the weight of the heroin analysed. At the close of the prosecution case, the learned trial judge amended the charge to one of possession. The respondent pleaded guilty to the amended charge and was sentenced to 11½ years' imprisonment and ten strokes of the rotan. The public prosecutor appealed.

Held, allowing the public prosecutor's appeal:

(1) In regard to the evidence of the chemist, unless the evidence is so inherently incredible that no reasonable person can believe it to be true, it should be accepted as prima facie evidence. As long as the evidence is credible, there is no necessity for the chemist to show in detail what he did in his laboratory. The evidence of the chemist in this case was more than sufficient as basis to call for the defence, granted that all the other ingredients of the offence had been successfully proved.

(2) The doubt entertained by the learned judge in this case was not arrived at on reasonable or rational grounds and the test he applied to the evidence of the chemist on the question of the weight of the drugs was a misdirection.

(3) The appeal should be allowed and the case remitted to the learned judge to call for the defence.

[Bahasa Malaysia summary

Di dalam kes ini, responden telah dituduh mengedar dadah, suatu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952. Keterangan diberi bahawa, apabila polis menggeledah suatu rumah, telah terdapat satu bungkusan dekat dengan responden. Bungkusan itu kemudiannya telah diperakui oleh pakar kimia mengandungi 34.81g heroin. Hakim yang arif yang membicarakan kes itu telah memutuskan bahawa keterangan yang diberi oleh pakar kimia tidak lengkap dan tidak memuaskan; ketepatan berat heroin adalah diragukan. Selepas kes bagi pihak pendakwa tamat, hakim yang arif itu telah meminda tuduhan kepada tuduhan milikan. Responden telah mengaku salah kepada tuduhan yang dipinda itu dan ia telah dihukum penjara selama 11½ tahun dan sepuluh pukulan rotan. Pendakwa raya telah membuat rayuan.

Diputuskan, membenarkan rayuan pendakwa raya itu:

(1) Berhubung dengan keterangan pakar kimia, kecuali jika keterangan itu dengan sendirinya begitu mustahil sehinggakan tidak ada orang yang munasabah yang boleh mem-